

**In re: Objection to Denial of Excess Liability Trust Fund Claim No. 200203501,
GasAmerica #47, Greenfield, Hancock County, Indiana
2004 OEA 123 (02-F-J-2954)**

TOPICS:

underground storage tank
gasoline
Excess Liability Trust Fund
reimbursement
substantial compliance
summary judgment
substantial evidence
contamination
Tightness Test
spill
notify
contractor

PRESIDING JUDGE:

Davidsen

PARTY REPRESENTATIVES:

Petitioner: Mitchell E. Katz, *pro se*, Lee & Ryan Environmental Services, Inc.
IDEM: Robert B. Keene, Esq.

DATE ISSUED:

November 19, 2004

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

Petition for Judicial Review in Marion County Superior Court 12, Civil Division
Cause No. 49F12-0412-PL-003911
Settlement, Stipulation and Court Order of Dismissal entered June 7, 2005

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STATE OF INDIANA)	BEFORE THE INDIANA OFFICE OF
)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION)	

IN THE MATTER OF:)	
)	
OBJECTION TO THE DENIAL OF)	CAUSE NO. 02-F-J-2954
EXCESS LIABILITY TRUST FUND)	
CLAIM NO. 200203501)	
GASAMERICA #47)	
GREENFIELD, HANCOCK COUNTY, INDIANA.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER

This matter came before the Court on Petitioner, GasAmerica Services, Inc.'s, April 15, 2003 Motion for Summary Judgment. Respondent Indiana Department of Environmental Management (the "IDEM") filed its Response in Opposition to Petitioner's Motion for Summary Judgment on May 27, 2003; Petitioner's Reply was filed on June 11, 2003 and Respondent's Sur Reply was filed on July 3, 2003; all of which pleadings are a part of the Court's record; and the Environmental Law Judge ("ELJ") having read and considered the petitions, motions, record of proceedings, evidence, and the briefs, responses and replies of the parties, now finds that judgment may be made upon the record; and the ELJ, by a preponderance of the evidence and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Final Order:

FINDINGS OF FACT

1. At all times pertinent to this matter, Petitioner, GasAmerica Services, Inc. ("GasAmerica") leased and operated a gasoline station located at 2744 S.R. 9, Greenfield, Hancock County, Indiana. (Petitioner's Motion for Summary Judgment, page 1; referred to hereinafter as "Motion").
2. On or about December 6, 1996, as a part of its routine maintenance, Petitioner's testing of its underground storage tank system and tanks resulted in failure of tightness testing for piping which connected the unleaded gasoline tank to the pump. The tightness test results conducted by Tanknology Corporation, International, on December 6, 1996, included an .823 gallon per hour leak rate (IDEM calculations demonstrated equivalency to 19.752 gallons per day or 7,209.48 gallons per year). IDEM's Response, page 4; Exhibit A. However, Petitioner determined that there were no leaks in remaining portions of the underground storage tank system. Id.; Motion, p. 1; affidavit of Dennis Spegal, Exhibit B, confirmed by Tanknology Corporation data, IDEM's Response, Exhibit A. While the parties' briefs dispute the accuracy or sensitivity of the tightness test, the parties agree that the tightness test was failed.

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3. Petitioner determined to replace the piping, in order to meet the facility's routine maintenance plan calling for an upgrade and to meet December, 1998 federal upgrade requirements. Petitioner hired a consultant, Jim Allen Maintenance, to perform all necessary work, and had instructed the contractor to report a suspected leak based on the results of the tightness test. Id. Mr. Allen's affidavit averred that he reported the suspected leak. Motion, Exhibit C, Affidavit of James Allen. The piping repairs were completed within six weeks after their discovery, at an approximate cost of \$30,000. No other environmental contamination was noted during the piping replacement. Motion, p. 1, 2. No environmental contamination was noted during the piping replacement. Motion, p. 2.
4. IDEM's Section Chief for the LUST Section in the Office of Land Quality, Craig Schroer, averred by affidavit that during December, 1996, he was Section Chief for the State Cleanup Section, and required operators to report suspected releases from regulated underground storage tanks within 24 hours, and that no such report had been received from or on behalf of Petitioner in December, 1996. IDEM's Response, p. 2, 5; Exhibit B, Affidavit of Craig Schroer.
5. In February, 2002, Petitioner hired Lee & Ryan Environmental Services to perform a Phase II subsurface investigation. In response to contamination discovered during the investigation, a Leaking Underground Storage Tank ("LUST") Site Investigation was performed to determine the nature and extent of petroleum impacted soil and groundwater. Id. On February 13, 2002, the contamination was reported to IDEM LUST Division; IDEM assigned the site incident number 2000203501, and a medium priority ranking. Id. See also IDEM's Response, Exhibit B, Affidavit of Craig Schroer.
6. On July 31, 2002, Petitioner submitted its claim for reimbursement of \$39,896.43 from the Excess Liability Trust Fund ("Fund").
7. On September 11, 2002, the Indiana Department of Environmental Management ("IDEM") sent a letter to Petitioner, providing notice of IDEM's determination that Petitioner was not eligible for reimbursement of \$39,896.43 for lack of substantial compliance with the regulations. Id. IDEM stated the basis for its determination as follows:

In accordance with 329 IAC 9-4 and 327 IAC 2-6.1, communicate a spill report to IDEM:

The applicant is not in substantial compliance with this requirement. The Tank Tightness Test appendix III located in the 7/11/02 ISC Final Report states that the regular unleaded line failed and it had been taken out of service. The certificate only has 2 lines on it out of 3 therefore this is actually a suspected release (two failed tests is a confirmed release). Suspected releases must be reported to the IDEM and either confirmed or negated within 7 days of suspected release report date. This suspected release was never reported and no documentation exists in the file discussing the test. The test was conducted on December 6, 1996 approximately 5 years before the release was reported to IDEM.

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Owner or operator has paid at least 50% of UST registration fees when due:

The applicant is in substantial compliance with this requirement and is eligible to receive 100% of eligible costs. However, this percentage is not applicable until substantial compliance is demonstrated for the above requirement.

Pursuant to IC 13-28-8-3 a deductible must be paid prior to reimbursement:

Not applicable until substantial compliance is demonstrated for both the above requirements.

8. On September 27, 2002, Petitioner filed a Petition for Review of IDEM's September 11, 2002 determination of ineligibility with the Indiana Office of Environmental Adjudication ("OEA"), thus initiating this cause.
9. On April 15, 2003, Petitioner filed its Motion for Summary Judgment. Respondent filed its Response in Opposition to Petitioner's Motion for Summary Judgment on May 27, 2003, in which it contended that summary judgment should be granted in its favor; Petitioner's Reply was filed on June 11, 2003 and Respondent's Sur Reply was filed on July 3, 2003. During the pendency of this cause before OEA, OEA did not set this matter for hearing or oral argument; neither party requested such a setting nor objected to the lack of a hearing or oral argument.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to Ind. Code § 4-21.5-7-3. IDEM's September 11, 2002 letter stating ineligibility for reimbursement constitutes an order pursuant to Ind. Code § 4-21.5-1-9. Per Ind. Code § 13-23-9-4, Petitioner, as an owner or operator of a facility, may appeal IDEM's denial of its request for reimbursement from the Fund.
2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993). Findings of fact must be based exclusively on the evidence presented to the ELJ, and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. 4-21.5-3-27(d). "*De novo* review" means that:

all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind.Ct.App. 1981).

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4. The OEA may enter judgment for a party if it finds that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law.” IC 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind.Ct.App. 2000).
5. To be eligible for reimbursement on its claim, Petitioner must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. The parties do not dispute that the site contamination was present on December 6, 1996. Rather, the dispute is as to whether Petitioner was in substantial compliance with release reporting requirements applicable on December 6, 1996.
6. Ind. Code § 13-23-8-4 authorized reimbursement to an owner or operator from the Fund “only if the owner or operator is in substantial compliance (as defined in 328 IAC 1-1-9) with the following requirements:
 - (1) The owner or operator has complied with the following:
 - (A) This Article or IC 13-7-20 (before its repeal).
 - (B) Rules adopted under this article or IC 13-7-20 (before its repeal).A release from an underground petroleum storage tank may not prevent an owner or operator from establishing compliance with this subdivision to receive money from the excess liability fund.
7. 327 IAC 2-6.1, the rule cited by IDEM in its September 11, 2004 determination letter, was not in effect on December 6, 1996, as it was adopted on February 25, 1997. 19 Indiana Register 2597 (June 1, 1996). Changes were adopted January 10, 2001. “Regulations, like statutes, cannot be applied retroactively without express direction to do so.” *Haelfing v. United Parcel Service*, 169 F.3d 494, *certiori den.*, 120 S.Ct. 64, 528 U.S. 820, 145 L.Ed.2d 55 (2000). 327 IAC 2-6.1 contains no express direction of retroactive application. 327 IAC 2-6.1 cannot be applied to guide agency action to determine compliance with reporting requirements for releases detected on prior to February 25, 1997.
8. Petitioner’s substantial compliance with release reporting requirements is analyzed by applying rules in effect on December 6, 1996, which provided:

329 IAC 9-4-1: Owners and operators of UST systems must report to the agency within twenty-four (24) hours and follow the procedures in 329 IAC 9-5-3 and, if applicable, 327 IAC 2-6-2 for any of the following conditions:

 - (1) The discovery by owners and operators or others of released regulated substances at the underground storage tank site or in the surrounding area (such as the presence of free product or vapors in soils, basements, sewer and utility lines and, nearby surface water).

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- (2) Unusual operating conditions observed by owners and operators (such as the erratic behavior of product dispensing equipment, the sudden loss of product from the UST system, or an unexplained presence of water in the tank), unless system equipment is found to be defective but not leaking and the system equipment is immediately repaired or replaced.
- (3) Monitoring results from the release detection method required under 40 CFR 280.41 and 40 CFR 280.42 that indicate a release may have occurred unless:
 - (A) the monitoring device is found to be defective and is immediately repaired, recalibrated or replaced, and additional monitoring does not confirm the initial result; or
 - (B) in the case of inventory control, a second month of data does not confirm the initial result.

329 IAC 9-4-3: Unless corrective action is initiated in accordance with 329 IAC 9-5, owners and operators must immediately investigate and confirm all suspected releases of regulated substances requiring reporting under section 1 of this rule or 327 IAC 2-6-2 within seven (7) days using the following steps or another procedure approved by the agency:

- (1) Owners and operators must conduct tests (according to the requirements for tightness testing in 40 CFR 280.43(c) and 40 CFR 280.44(b)) to determine whether a leak exists in that portion of the tank that routinely contains product or the attached delivery piping or both. Owners and operators must repair, replace or upgrade the UST system and begin corrective action in accordance with 329 IAC 9-5 if the test results for the system, tank, or delivery piping indicate that a leak exists. Further investigation is not required if the test results for the system, tank, and delivery piping do not indicate that a leak exists and if environmental contamination is not the basis for suspecting a release. Owners and operators must conduct a site check as described in subdivision (2) if the test results for the system, tank and delivery piping do not indicate that a leak exists but environmental contamination is the basis for suspecting the release.

On December 6, 1996, 328 IAC 1-1-9 provided that:

“Substantial compliance” means that at the time a release was discovered, the tank was registered under IC 13-7-20 and the owner or operator had taken affirmative steps to meet the requirements of the following underground petroleum storage tank laws:

- (1) IC 13-7-20.
- (2) Rules adopted under IC 13-7-20.
- (3) 42 U.S.C. 6991 through 42 U.S.C. 6991i.
- (4) Regulations adopted under 42 U.S.C. 6991 through 42 U.S.C. 6991i.

Proof of substantial compliance includes, but is not limited to, evidence of contractual agreements or other verifiable action undertaken sufficiently in advance of a compliance date to provide a reasonable probability of meeting the terms of the statute or regulation.

Similar requirements were stated in Ind. Code § 12-23-8-4 and in Ind. Code § 13-7-20, et Seq., in their enacted forms in December, 1996.

- 9. The meaning of statutes and rules is controlled by their express language. *Chavis v. Patton*, 683 N.E.2d 253, 257 (Ind.Ct.App. 1997). A court may not read into a statute (or rule) that which is not the expressed intent of the legislature, *State v. Derossett*, 714 N.E.2d 205

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(Ind.Ct.App. 1999); instead, a court is to ascertain and give effect to the legislature's intent, *Hendrix v.State*, 759 N.E.2d 1045 (Ind. 2001), and to do so in such a way as to prevent absurdity and hardship and to favor public convenience. *Livingston v. Fast Cash USA, Inc.*, 753 N.E.2d 572, 575 (Ind. 2001) When a statute or regulation is clear and unambiguous on its face, the court does not need to "apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary and usual sense." *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 703-704 (Ind. 2002).

10. Merriam-Webster Online Dictionary's (at www.m-w.com) pertinent definition of "substantial" is "being largely but not wholly that which is specified", and of "compliance" is "conformity in fulfilling official requirements". 328 IAC 1-1-9 provided examples of proof of substantial compliance as evidence of contractual agreements or other verifiable action undertaken sufficiently in advance of a compliance date to provide a reasonable probability of meeting the terms of the statute or regulation.
11. OEA is required to base its factual findings on substantial evidence. *Huffman v. Indiana Office of Environmental Adjudication*, 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also* Ind. Code § 4-21.5-3-27(d). While a controversy exists as to whether Petitioner reported the December, 1996 suspected release, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." Ind. Code § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.e.2d 559, 565, n.1 (Ind.Ct.App. 1993).
12. In this matter, both parties have asserted that there is no genuine issue of material fact as to whether Petitioner's request for reimbursement should be granted. However, the parties seek opposing results, all to be determined on facts placed in evidence in the parties' summary judgment pleadings. The OEA is therefore required to determine whether Petitioner's actions concerning the December 1996 suspected release constituted substantial compliance with applicable regulations.
13. The substantial evidence presented by the parties demonstrates that in response to the failed tightness test, Petitioner hired Jim Allen Maintenance to undertake the work to replace the piping and to report the suspected December, 1996 release. As part of the work performed for Petitioner, Mr. Allen stated under oath that he did properly report the suspected release, and did investigate for the presence of contamination, and that he found none. IDEM did not dispute that the work was done, but denied that Petitioner reported the suspected release as required because IDEM's records show no such report on a paper log as described by IDEM's Craig Schroer, but do show incident reporting in February, 2002. IDEM further denied that Petitioner investigated for contamination, but supports its claim of lack of proper investigation on the contamination reported in February, 2002, and estimated that the amount

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of release may have been equal to 19.752 gallons per day or 7,209.48 gallons per year. However, no evidence was presented to the OEA as to the amount of contamination present, nor was substantial evidence presented that contamination was present as a result of the December, 1996 release.

14. None of the applicable regulations or statutes prohibits an owner or operator of an underground storage tank facility from entering into contractual relationships to perform its regulatory duties. Contractual relationships are specifically referenced as an example of substantial compliance as defined in 328 IAC 1-1-9.
15. Petitioner has provided substantial evidence that it was in substantial compliance with the statutory and regulatory requirements applicable to the December 6, 1996 tightness test. Petitioner's motion for summary judgment should be granted, Respondent IDEM's motion for summary judgment stated in its May 27, 2003 Response in Opposition to Petitioner's Motion for Summary Judgment should be denied, and Petitioner is eligible for reimbursement on its claim for \$39,896.43 from the Indiana Underground Storage Tank Excess Liability Trust Fund.

FINAL ORDER

THE COURT hereby FINDS AND CONCLUDES that Petitioner's motion for summary judgment should be granted, Respondent IDEM's motion for summary judgment stated in its May 27, 2003 Response in Opposition to Petitioner's Motion for Summary Judgment should be denied, and Petitioner is eligible for reimbursement from the Indiana Underground Storage Tank Excess Liability Trust Fund should be paid.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Petitioner. Petitioner's motion for summary judgment is GRANTED, Respondent IDEM's motion for summary judgment stated in its May 27, 2003 Response in Opposition to Petitioner's Motion for Summary Judgment is DENIED, Petitioner's claim for reimbursement for \$39,896.43 from the Indiana Underground Storage Tank Excess Liability Trust Fund is to be paid.

You are further notified that pursuant to provisions of IC 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is an order subject to further review consistent with applicable provisions of IC 4-21.5 and other applicable rules and statutes.

IT IS SO ORDERED THIS 19th day of November, 2004.

Hon. Mary L. Davidsen
Chief Environmental Law Judge